services are emphatically not the cheapest.

Worry about improving legal education derives partly from the belief that the inferior law schools are too strongly intrenched to be ousted or reformed. This remains to be seen. As for a division of the bar, it is submitted that the only division conceivable is one between counselors and advocates. But this cannot grow out of two kinds of law schools. It is possible that in time advocacy will emerge as a recognized specialization in a bar of greater solidarity than now exists, just as the College of Surgeons emerged from the American Medical Society. But in such case the advocate would have to rely on superior ability to try cases. There is no prospect that the general practitioner will ever be deprived of his traditional power to conduct litigation.

There is another way in which these difficulties might be resolved. It lies in encouraging the study of law, not with a view to serve clients, but to fill the places now taken by "house lawyers" in private employment. A new designation would have to be found for this class. They would not be entitled to perform any of the essential functions of the lawyer. They would be ineligible to judicial office. Their education would not be a matter of great public concern. This would preserve a field for inferior law schools, subject to competition from the universities which have added special law courses for students in commerce, transportation and executive training. It is a good thing to have a knowledge of law widespread in the community, providing the rights of clients are not jeopardized. This "outer bar" would be as favorably situated to hold public offices as is the lawyer himself and thus the imagined danger of an aristocracy of brains and knowledge monopolizing statecraft and legislation would be laid.

But whatever the outcome we must aim to establish such standards of education and ethics that the word lawyer will always and everywhere signify genuine competence and absolute fidelity. This is no mere counsel of perfection. It is entirely practical. And as we progress we will be looking toward a golden age when the legal profession will be useful and respected to a degree now barely foreshadowed.

Unlawful Practice of the Law Must Be Prevented

By JULIUS HENRY COHEN

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CHESTER S. LORD, Chancellor of the Board of Regents of the University of the State of New York, said in an address to the Chamber of Commerce of the State of New York on February second last: "Quack doctors and quack dentists have been driven from the state. The regents are called on constantly to prosecute illegal practitioners and to revoke licenses for law violation."

He reminded us that "not so very long ago no educational test was re-

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quired of a dentist. Young men entered offices and learned the business by experience. Some of them became very good dentists toward the end of their lives but meantime their patients were the victims of their search for experience." An abscess in a tooth resulting from a poor filling is a pretty dangerous thing and something against which we all agree the unsuspecting patient should be protected. No one questions the wisdom of regulating the practice of medicine or the practice of pharmacy, and we have come to recognize that so important to health is proper plumbing that we permit only licensed plumbers to practise. The care of horses and cows and other cattle we regard of sufficient consequence to permit only licensed veterinarians to practise. Now it came to pass in the very early history of civilization that contact with the law required knowledge and advice, and as the ignorant are easily misled by quacks and charlatans, the state undertook to make sure that those who applied such knowledge and gave such advice should be qualified.

THE SOCIAL NEED FOR A BAR

It was easy to adopt this principle in the case of the lawyer. Historically, he owes his position to the fact that he is an "officer of the court," and, under the court, subject always to discipline for improper conduct.[1] Where there is no licensed bar, there is trickery and chicanery. In China there is no licensed bar, but there are lawyers. They are called "rascals of the lawsuit" (chung-guen).[2] They undertake to furnish legal advice and assistance to the litigant, and, incidentally, to capture the friendly ear of the court in behalf of the litigant. If caught, they are sent to jail. But the need for a bar produces one, even unlicensed. For many years in our large cities the poor, especially those who came from foreign countries, where the notary public was himself a trained official competent to draw legal instruments, were the prey of notaries who drew for them not only leases and bills of sale, but wills and other documents, and undertook to give legal advice. Few of these practices now exist in New York or Kings County. With the aid of the State Industrial Board, the Committee on Unlawful Practice of the Law of the New York County Lawyers' Association and the Brooklyn Bar Association have driven them out. As Judge Crane pointed out in *People* v. *Alfani*, 227 N. Y. 334:

> Is it only in court or in legal proceedings that danger lies from such evils? On the contrary, the danger there is at a minimum, for very little can go wrong in a court where the proceedings are public and the presiding officer is generally a man of judgment and experience. Any judge of much active work on the bench has had frequent occasion to guide the young practitioner or protect the client from the haste or folly of an older one. Not so in the office. Here the client is with his attorney alone, without the impartial supervision of a judge. Ignorance and stupidity may here create damage which the courts of the land cannot thereafter undo. Did the legislature mean to leave this field to any person out of which to make a living? Reason says no. Practising law as an attorney likewise covers the drawing of legal instruments as a business.

The Committee on Unlawful Practice of the Law of the New York County Lawyers' Association owes its existence to a study of this problem made by a special committee in the year 1914. This committee reported the conditions as they were found in New York City and stressed the need for a continuous investigatory and prosecuting agency. The work of the Committee, however, is not limited to the prosecution of notaries public and

[1] *The Law: Business or Profession?* Chapters IV, V, VI.

[2] *Idem. p.* 46.

individuals who pretend to be qualified, yet are not licensed to practise law, but has extended to the field of corporate endeavor. Not much argument is necessary to convince the layman that wherever special and expert skill is required, the state should protect him, as it does in the case of the dentist and the druggist and the doctor. But it is the common view that it does not require much skill to draw a lease or a contract or a will. Writers like Graham Wallas, for example, wonder why one should be obliged to pay a fee to a lawyer for drawing an instrument when forms could be easily prepared by the state that laymen could fill in.

CARELESS LEGAL WORK A CAUSE OF LITIGATION

Of course, every lawyer knows how dangerous a doctrine this is, and yet how profitable to the bar acceptance of it becomes, for it is just the careless drawing of legal documents that makes for litigation. The New York State Bar Association in the year 1914 made a study of the causes of preventable litigation and discovered that the largest percentage of litigation came through improperly drawn contracts and wills. Too often even capable business men treat the drawing of a lease as though it were a purely formal matter, taking the advice of a real estate broker or a justice of the peace. We are all so slipshod generally in this country that any effort to use language carefully and with definite meaning is looked upon with disdain. In his interesting book, *The Behavior of Crowds*, Everett Dean Martin traces the popular contempt for knowledge to the "personal inferiority complex" and the desire of the crowd to put everyone on a level. Whether this is true or not, it is the fact that only the person who is himself trained in some art appreciates the value of training in others. It is the experienced business man who realizes the value of the lawyer's care and advice, not the ignorant one.

I once heard Chancellor Day of the Syracuse University at a public dinner arouse an audience of business men to enthusiasm with the suggestion that if only we sent business men to Congress instead of lawyers, we should be much better off. He was followed by Martin Littleton, who at once suggested that this would be entirely satisfactory to the lawyers, for, if the business men would make the laws and leave to the lawyers the litigation that would follow, it would be a splendid division of labor. And it is true of legal documents, as well as of legislation that the slipshod, careless and indifferent use of language only leads to the employment of lawyers.

CORPORATIONS AND TRUST COMPANIES IN LEGAL CAPACITY

In the case of the notaries, the poor and the weak are preyed upon. But what of the corporations that draw deeds and wills and other documents? Are they not expert, perhaps more expert than the lawyer? Doctor Frank Crane, writing in the *Globe* the other day, said: "Even able lawyers have been known to make wills that would not stand. For this reason trust companies are coming more and more in favor among testators who desire to make sure that their property will be disposed of according to their wishes."

But the trust companies of New York City have come to realize that this is wrong doctrine. They subsist upon the confidence of the public in the fiduciary relationship. The trust company is something that somebody trusts. The trustee is one who holds property in trust for another. Now, it is precisely that fiduciary principle which the lawyer must apply almost

every moment of his work. He is not only the trustee of property. He is the trustee of vital things. He knows the secrets of the client. He knows intimately the family relations. He must be trusted to keep them confidential. The dentist may leave you with an abscess in your tooth that may, it is true, ultimately lead to your destruction, but, after all, that is only a physical worry. The lawyer who betrays his trust may leave you with an abscess that eats into the very heart of your family life after you are dead and gone. Never before in the history of the bar has so much dependence been placed upon the confidence which is reposed in lawyers. Not an enterprise of any consequence, not a relationship of any pecuniary importance is formulated without the participation in some way of the lawyer, and to draw the documents requires a knowledge of the human factors involved. We are very far away in actual life from Quirk, Gammon and Snap and their scheme with Tiddlebat Titmouse, though if the layman needs instruction on this matter of what happens when the lawyer fails to apply the high standards of his profession and sets out to betray the trust reposed in him, he need but read Warren's *Ten Thousand a Year.*

THE FIDUCIARY PRINCIPLE

It is the *fiduciary principle*, then, which is the breath of life of the profession. It is also the breath of life of the trust company. The New York City trust companies have learned, therefore, that the fiduciary principle is not preserved when the trust company draws the will for the proposed client. It may, indeed, act as trustee of his property. It may, indeed, counsel him on business matters. But when it comes to drawing his will, or, for that matter, the deed of trust by which the trust company is to be his trustee, the trust company lawyer cannot act both for the trust company and the maker of the will without violating the fiduciary principle. *No man can serve two masters.* It is precisely at this point that the differentiation between *business* and *profession* occurs. The drawing of a will is a human thing. It is not a mere matter of phraseology and typewriting. It involves intimate knowledge of family relations, an inner grasp of the secrets of him who is about to prepare a record of his last wishes. What he does by this document may mar or make those dependent upon him and may mar or make his own record. Nothing short of the completest confidence and disclosure will do: therefore, the direct personal relationship between attorney and client; therefore, the necessity for preventing or precluding a conflict of duties.

In the analysis of the philosophy underlying these relations, it is a very significant thing that the Committee on Professional Ethics and the Committee on Unlawful Practice of the New York County Lawyers' Association are acting on the same fundamental principles. In Question and Answer No. 201 the Committee on Professional Ethics said:

In the opinion of the Committee is there any professional impropriety on the part of a lawyer entering into the formation of a partnership with a certified public accountant for the practice of public accounting and tax report service?

A majority of the Committee is of the opinion that the implication of the arrangement and of the question is that the partnership furnishes the legal services of the lawyer to its customers; they consider that such exploitation of professional services for the profit of or by those who are not entitled to practice law (in whatever guise cloaked) is not professionally proper, because it admits to the emoluments of the office those who are not entitled to its privileges or bound by its discipline or amenable to summary correction, and affords an opportunity to the layman to give legal advice.

The collection agency thrives on the solicitation and advertising for business. The lawyer may not solicit or advertise. What this means is fully disclosed in the discussions in the two cases of *Matter of Schwarz*, 175 App. Div. 335, and *Matter of Schwarz*, 195 App. Div. 194. When the lawyer really begins to advertise as business men advertise to get business, he lowers himself and his profession. He impairs the fiduciary principle. If he is not to advertise or solicit directly, what shall we say then of the lay agency which does the advertising and makes the profit, utilizing the lawyer as a mere employe, selling his service without any direct responsibility between him and the client.

DUTY OF THE BAR TO SAFEGUARD THE COMMUNITY

It is for these reasons that the bar carries the responsibility of preventing the so-called practice of the law by corporations and laymen. It is no answer to say that not all lawyers are properly equipped, or that not all lawyers are men who observe the fiduciary principle. It is the duty of the bar to see that lawyers are properly equipped and that all do observe the fiduciary principle. This duty, let it be frankly admitted, has not been fully performed by the bar. To meet this duty fully it is now organizing. It must take steps to see that a bar adequately trained, of moral character, performs the service to the community; but it must also perform the duty of safeguarding the community from those who have not even the present limited training required for admission to the bar, and it must also protect the community from itself treating the lawyer's services as a "jobber treats merchandise." When that happens, the lawyer as a professional man goes. But with him goes the *fiduciary principle*, so vital and so essential for the protection of the community in the relation between lawyer and client. The doctrine of *caveat emptor* will not give to the community the protection it must have in such a relationship. Only the highest and best standards will do. No others will suffice. The layman is not able to protect himself. The community must do it for him.

A Selected Bibliography on Legal Ethics

Ethics of the Legal Profession, by Orrin N. Carter, Judge of the Supreme Court of Illinois. Pp. 116. Chicago: Northwestern University Press, 1915.

A most illuminating compendium of the subject, with an introduction by Professor John E. Wigmore. Contains profuse citations and an extensive bibliography; also, the Canons of Ethics of the American Bar Association.

Cases and Other Authorities on Legal Ethics, by George P. Costigan, Jr., Professor of Law in Northwestern University. Pp. 616. St. Paul: West Publishing Company, 1917.

This is one of the West Publishing Company's Case Book Series, published under the editorship of Professor Wm. R. Vance of the Yale Law School. Beside leading cases on the conduct of lawyers adjudicated in the courts, there is included the Canons of Ethics of the American Bar Association and also those of the Boston Bar Association; also, the classic Fifty Resolutions of David Hoffman and many of the answers to questions on legal ethics propounded to the Committee on Professional Ethics of the New York County Lawyers' Association. Quotations from the published opinions of many lawyers on various questions of legal ethics are also given.

Ethics in Service, by William H. Taft, Chief Justice of the United States. Pp. 101. New Haven: Yale University Press, 1915.